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No. 08-1353

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In The

Supreme Court of the United States

BOROUGH OF CARLSTADT and
PLANNING BOARD OF CARLSTADT,

Petitioners,

v.

TOMU DEVELOPMENT CO., INC., and the
NEW JERSEY MEADOWLANDS COMMISSION,

Respondents.

**On Petition For A Writ Of Certiorari
To The Superior Court Of
New Jersey, Appellate Division**

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. PHILLIPS, ESQ.
Counsel of Record
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
Counsel for Respondent
Tomu Development Co., Inc.

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

Proceedings in the courts below included the following parties:

Tomu Development Co., Inc.
(Plaintiff/Respondent)

Borough of Carlstadt (Defendant/Petitioner)

Planning Board of the Borough of Carlstadt
(Defendant/Petitioner)

New Jersey Meadowlands Commission
(Defendant/Respondent)

The following were parties to consolidated trial court proceedings and to the Appellate Division's opinion; however, the appeals were not consolidated:

Borough of East Rutherford
(Defendant)

Planning Board of the Borough of East Rutherford
(Defendant)

RULE 29.6 NOTATION

The respondent has no parent, and there are no publicly held companies that hold any stock of the respondent.

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Respondent Tomu Development Co., Inc. ("Tomu") respectfully requests that this Court deny the petition for a writ of certiorari.

The appointment of the Monitor to oversee the development and implementation of Carlstadt's land use regulations was necessary to ensure that Carlstadt would not directly or indirectly prohibit the development of new homes for low- and moderate-income households. In an e-mail, the Mayor of Carlstadt announced that he and his fellow Councilmembers were "overjoyed" at the possibility that they would be able to delay the development of affordable housing on Tomu's property for twenty years by raising various legal impediments. Based on this and other evidence, the state trial court and appellate court determined that Carlstadt's officials would use any means at their disposal to thwart new affordable housing opportunities within Carlstadt and that the appointment of a Monitor to oversee Carlstadt's land use process was necessary to ensure affordable housing would be built in Carlstadt.

Carlstadt's anti-affordable housing policies and practices violate New Jersey's Constitution. In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* ("*Mount Laurel II*"), 456 A.2d 390 (N.J. 1983), the New Jersey Supreme Court determined that developing municipalities have an obligation to create a realistic opportunity for their fair share of affordable housing. This obligation has been endorsed by the New Jersey Legislature, which in 1985 adopted the New Jersey Fair Housing Act, N.J. Stat. Ann.

§ 52:27D-301, *et seq.*, which created the New Jersey Council on Affordable Housing ("COAH"). COAH is the state agency responsible for adopting regulations to calculate each municipality's fair share of affordable housing and to govern the mechanisms available for municipalities to satisfy their fair share obligations. N.J. Stat. Ann. § 52:27D-307. New Jersey courts defer to COAH's calculations of a municipality's fair share obligations. *See Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) (upholding the New Jersey Fair Housing Act).

In 1987, COAH adopted N.J. Admin. Code § 5:92, which is known as the "Round 1" substantive regulations and governed the time period from 1987 through 1993. In 1994, COAH adopted N.J. Admin. Code § 5:93, which is known as the "Round 2" substantive regulations and governed the time period from 1987 through 1999, thereby subsuming the fair share obligations imposed under Round 1. In 2004, COAH adopted N.J. Admin. Code § 5:94, which is known as the "original Round 3" substantive regulations, and which governed the time period from 1987 through 2014. COAH's original Round 3 regulations were substantially invalidated during the pendency of this litigation in *In re Adoption of N.J.A.C. 5:94*, 914 A.2d 348 (N.J. Super. Ct. App. Div. 2007). In 2008, COAH adopted N.J. Admin. Code § 5:97, which are COAH's "revised Round 3" substantive regulations and are currently on appeal before the New Jersey Superior Court, Appellate Division.

Carlstadt's fair share obligation, as determined by COAH, changed depending upon the regulations in effect at the applicable time period. At the time of trial, Carlstadt's fair share obligation for the development of new affordable housing units was 186 affordable housing units, *see* N.J. Admin. Code § 5:94, App. C, and its fair share obligation to rehabilitate affordable housing units was 12 affordable housing units.

In adopting its regulations, COAH was aware that some municipalities, such as Carlstadt, have land within the New Jersey Meadowlands Commission ("NJMC") District. COAH determined that Carlstadt, as every other municipality with land within the NJMC District, was responsible for the affordable housing on land within the NJMC District. *See* 26 N.J. Reg. 2300(a), 2345 (June 6, 1994).

The NJMC has primary land use authority for the adoption of land use regulations and the approval of development applications within the NJMC District. *See* N.J. Admin. Code § 13:17-1, *et seq.* However, Carlstadt has influence over the NJMC's land use regulations and the approval of development applications within the NJMC District through its position on the Hackensack Meadowlands Municipal Committee ("HMMC"). N.J. Stat. Ann. § 13:17-8. Furthermore, Carlstadt's officials have indirect authority over such matters under the well-recognized but unwritten practice that the NJMC will not adopt land use regulations or approve development applications against the wishes of the municipality where the development will occur.

Throughout this litigation, the NJMC has made it clear that it would approve the rezoning of and development of affordable housing units within the Carlstadt portion of the NJMC District, such as Tomu's property, if Carlstadt consented to such development. However, Carlstadt has steadfastly opposed such a development. Despite its clear obligations under COAH's regulations, Carlstadt failed to create a realistic opportunity for the development of any affordable housing units within its borders. Since at least 1980, no new affordable housing units have been developed in Carlstadt.

In *Mount Laurel II*, 456 A.2d at 452-54, the New Jersey Supreme Court effectively deputized developers to enforce the constitutional obligation for municipalities to create a realistic opportunity to develop their fair share of affordable housing by announcing that a developer would be awarded a "builder's remedy," *i.e.*, the right to develop its property at an increased density, if the developer establishes that the municipality was non-compliant with its affordable housing obligations and the developer makes a substantial contribution of affordable housing. A municipality could defeat a builder's remedy by establishing that the proposed development is clearly contrary to sound planning and environmental concerns. *See id.* at 452. The New Jersey Legislature created an administrative procedure whereby Carlstadt, as any other municipality, may voluntarily develop an affordable housing plan, known as a "Housing Element and Fair Share Plan," and petition COAH for "substantive certification." A municipality that

receives substantive certification is entitled to enhanced protection from builder's remedy litigation. *See* N.J. Stat. Ann. § 52:27D-317. *See generally* N.J. Admin. Code §§ 5:91 (Rounds 1 and 2 procedures), 5:95 (original Round 3 procedures), 5:96 (revised Round 3 procedures).

Despite the availability of substantive certification, Carlstadt never developed a compliant Housing Element and Fair Share Plan and never petitioned COAH for substantive certification. Carlstadt chose to remain vulnerable to a builder's remedy lawsuit, such as the one filed by Tomu in this case. Tomu filed litigation seeking a builder's remedy for its approximately 26.9-acre parcel of land that straddles the Borough of Carlstadt and the Borough of East Rutherford. Of those acres, approximately 8.9 acres are uplands and available to be developed consistent with the applicable environmental regulations.

The Tomu property is suitable for high density residential development. Among other proofs submitted on this issue at trial, in 1989, the NJMC approved variances and a special exemption related to the development of 350 residential units, with 20% of those units to be designated as affordable housing units, and a substantial non-residential component on the Tomu property. Due to the poor real estate market in the early 1990s, that project was not constructed. Later, Tomu attempted to gain municipal support for the development of other projects on the property, including a high density residential development with a substantial amount of affordable

housing. Carlstadt's officials were hostile to such a proposal. When Carlstadt's officials learned that Tomu proposed to develop residences on the portion of the Tomu property within Carlstadt, Carlstadt adopted a resolution authorizing it to take the Tomu property by eminent domain. Carlstadt has never moved forward with its condemnation action.

The trial court awarded a builder's remedy to Tomu for a total of 840 residential units, including 140 affordable housing units. Of those, 420 residential units and 80 affordable units are to be located in Carlstadt. Despite the prior approval of a substantial mixed use development on the Tomu site, Carlstadt continues its unsupportable assertion that the development of a high density residential development on the Tomu property is contrary to sound land use and planning due to its isolation from Carlstadt's established residential neighborhood. Carlstadt's commentary on this issue is not linked to any federal issue presented by Carlstadt in its petition, as Carlstadt has not petitioned this Court to reverse the builder's remedy awarded to Tomu. However, it is worth noting that Carlstadt's evidence on this issue at trial was so weak that the trial court rejected Carlstadt's planning expert's criticism of the development of the Tomu site as a "net opinion."

Following the trial court's award of the builder's remedy to Tomu, the trial court provided Carlstadt with one last chance to develop a compliant Housing Element and Fair Share Plan. The trial court warned that if Carlstadt defaulted on this, the trial court

would "permanently invalidate" Carlstadt's land use regulations and enjoin all development applications. (Pet. 61a-62a.)

Carlstadt submitted a woefully deficient Housing Element and Fair Share Plan. The court-appointed Special Master, who was later appointed to serve as Monitor, determined (Pet. 14a) that "Carlstadt did not make a good faith effort to comply" with their fair share obligations following the award of the builder's remedy. The state trial court (Pet. 36a) characterized Carlstadt's compliance efforts as a "thinly veiled half-baked offering." As a result, the trial court stripped Carlstadt of its land use authority and appointed a Monitor to develop a compliant Housing Element and Fair Share Plan and seek substantive certification from COAH. The trial court also prohibited Carlstadt's officials from acting as the official representatives of Carlstadt in their dealings with the NJMC.

The appellate court affirmed the trial court's decision in all respects, including the key factual finding that "East Rutherford and Carlstadt showed no inclination to voluntarily meet their affordable housing obligations." (Pet. 15a.) Carlstadt petitioned the New Jersey Supreme Court for certification, but the New Jersey Supreme Court denied certification.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The issues raised in Carlstadt's petition involve unique facts and circumstances that are peculiar to the parties and land use regulation within the State of New Jersey.

Carlstadt's petition involves a land use matter, which is well within the peculiar knowledge and expertise of the New Jersey courts. *See, e.g.*, *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 347 (2005) ("[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical and legal questions related to zoning and land use regulations.").

The State of New Jersey controls the use of all of the land within it, and it delegated the authority to regulate the use of a portion of that land to Carlstadt. However, that delegation is conditioned on Carlstadt complying with the New Jersey Constitution by not engaging in exclusionary land use practices. By engaging in such exclusionary land use practices, Carlstadt breached the delegation of the state's authority to regulate the use of land. *See Mount Laurel II*, 456 A.2d at 415. As a direct result of that breach, the state trial court ordered Carlstadt to develop a compliant Housing Element and Fair Share Plan. (Pet. 61a-62a.) Because Carlstadt refused to develop a compliant Housing Element and Fair Share Plan within that time period, the state trial court was empowered to strip Carlstadt of its zoning authority and require the approval of specific development projects.

See Mount Laurel II, 456 A.2d at 455-58. Rather than exercise this power directly, the state trial court and appellate court determined that it was more appropriate to remove the zoning and land use authority from Carlstadt's officials, who made it clear that they would not voluntarily comply, and delegate that authority to the Monitor.

Given the peculiarities of New Jersey law on this issue, Carlstadt's petition does not raise issues that will have broad application beyond the immediate parties to the litigation, which is a relevant factor for the Court to consider in determining whether to grant certiorari. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Carlstadt's petition points to no other state that has interpreted its state constitution as imposing similar affordable housing requirements. Carlstadt's petition points to no disagreement among state courts and federal courts on the remedial powers available to a court to enforce compliance. Therefore, the Court's review and decision on this matter would likely only impact municipalities and developers in New Jersey.

Even within New Jersey, many aspects of this litigation have only limited impact. At its core, the litigation involves Carlstadt's attempt to hide behind the jurisdiction of the NJMC to avoid its obligations under New Jersey's Constitution. Only fourteen of New Jersey's municipalities have land wholly or partially within the NJMC District.

Furthermore, the issues raised within Carlstadt's petition flow from the state trial court's factual determination that Carlstadt would continue to violate New Jersey's Constitution if it were permitted to do so. This is a unique occurrence, which compelled the state trial court to create a "novel" remedy of stripping Carlstadt of its zoning authority and appointing the Monitor. (Pet. 16a.) In the twenty-six years since *Mount Laurel II* was decided, there have been no other instances where a trial court has been compelled to issue such a remedy due to the recalcitrance of the municipality.

2. There is no merit to the voting rights issue raised in Carlstadt's petition.

Carlstadt extensively relies upon *Bush v. Gore*, 531 U.S. 98 (2000), which the Court made clear would not be precedential. Furthermore, because Carlstadt did not raise this issue below, this Court should not consider it in determining whether to grant certiorari. *See Howell v. Mississippi*, 543 U.S. 440 (2005).

Even assuming arguendo that Carlstadt sufficiently raised this issue below, Carlstadt, a municipal corporation, has no standing to assert an alleged violation of federal voting rights on behalf of its residents. *See United States v. Hays*, 515 U.S. 737, 742-43 (1995) (generally discussing standing for alleged violations of voting rights). Carlstadt does not cite to any legal authority granting it standing to assert such a claim on behalf of its residents.

Even further assuming arguendo that Carlstadt had standing to allege a voting rights violation in this matter, there has been no violation. The state trial court and appellate court decisions do not directly or indirectly regulate the right of Carlstadt's residents to vote for Mayor and Councilmembers. Rather, the trial court and appellate court decisions strip the Mayor and Councilmembers of some of their official authority.

This is a dispute between the State of New Jersey and Carlstadt, one of its municipalities, regarding who will act as Carlstadt's representative before the HMMC, a state-created commission. The State of New Jersey has the authority to control land use within its borders and it can delegate that authority as it deems appropriate. The State of New Jersey has decided to delegate some of that authority to the Borough of Carlstadt, as set forth in the Municipal Land Use Law, N.J. Stat. Ann. § 40:55D-1, *et seq.*, and some of that authority to the NJMC, as set forth in N.J. Admin. Code § 13:17-1, *et seq.* As part of this regulatory scheme, the New Jersey Legislature created the HMMC, *see* N.J. Stat. Ann. § 13:17-8, and permitted Carlstadt, along with the other municipalities with land within the NJMC, to influence the NJMC's land use decisions.

The State of New Jersey has the power to strip Carlstadt of its seat at the HMMC and to appoint whomever the state chooses. There is no federal constitutional right implicated in such disputes between municipalities and the state where they are located.

See City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923).

3. There is no restraint on Carlstadt's officials from engaging in political speech that may be protected by the United States Constitution.

There are no facts supporting Carlstadt's claim that its officials have been denied the opportunity to engage in political speech protected by the United States Constitution. Both the trial court and the appellate court made clear that the Monitor has the authority to officially act on behalf of Carlstadt and to speak as the official voice of Carlstadt in matters involving the NJMC. As stated by the appellate court (Pet. 19a-20a), the appointment of the Monitor does not prohibit any resident of Carlstadt, including Carlstadt's elected representatives, from personally engaging in political speech. Carlstadt acknowledges (Pet. 21 n.3) that the appellate court determined that "a Carlstadt official may, in a personal (not official) capacity, freely speak before the NJMC." Carlstadt's officials are merely prevented from representing that their personal opinions are the official policies of Carlstadt. As a result, there is no restraint on political speech. There is only a restraint on official action to be undertaken by Carlstadt's officials.

This provision was necessary because Carlstadt's officials are determined not to comply with Carlstadt's affordable housing obligations. If Carlstadt's

officials were entitled to speak as the official voice of Carlstadt regarding these land use matters, they could thwart the development of affordable housing within Carlstadt's borders by using their influence over the policies of the NJMC and the HMMC.

4. There was no violation of Carlstadt's due process rights under the United States Constitution.

Carlstadt is a creature of the state, and Carlstadt does not have rights under the United States Constitution limiting the power of the state to delegate authority to them. *See City of Trenton*, 262 U.S. at 187. Carlstadt acknowledges this well-established rule but then asserts that Carlstadt is entitled to the fundamental fairness protections afforded by the Due Process Clause of the United States Constitution. Carlstadt has not presented any rationale for this Court to disturb the well-established rule the municipalities do not have due process rights under the United States Constitution.

Even assuming arguendo that Carlstadt has a constitutional right to due process, Carlstadt had reasonable notice that the court would assume responsibility over Carlstadt's land use regulations if Carlstadt did not prepare a compliant Housing Element and Fair Share Plan as ordered by the court. Since *Mount Laurel II* was decided in 1983, Carlstadt was on notice of its obligations to create a realistic opportunity for the development of its fair share of

affordable housing. When the trial court determined as a matter of law that its land use ordinances were constitutionally deficient, Carlstadt knew that it needed to remedy those deficiencies. Carlstadt never voluntarily undertook to remedy these deficiencies and waited for the trial court to order it to do so. In that order (Pet. 61a-62a), the trial court made clear that it would impose harsh sanctions if Carlstadt failed to comply. In *Mount Laurel II*, 456 A.2d at 455-58, the New Jersey Supreme Court made it clear that trial courts have broad remedial powers, including stripping municipalities of their zoning authority and requiring the approval of specific development projects. *See id.* at 455-58. Given the clear language set forth in *Mount Laurel II*, and the trial court's order, Carlstadt had adequate notice that the court could impose a remedy designed to ensure compliance with its obligations under the New Jersey Constitution. Therefore, there was no violation of the United States Constitution's due process protections.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN C. PHILLIPS, ESQ.
Counsel of Record
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
Counsel for Respondent
Tomu Development Co., Inc.